FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

July 28, 2011

SECRETARY OF LABOR,	:	PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-1533
Petitioner,	:	A.C. No. 15-18854-160414
	:	
	:	Mine: Liggett No. 3
v.	:	
	:	Docket No. KENT 2008-1534
	:	A.C. No. 15-19080-160415
LIGGETT MINING, LLC,	:	
Respondent.	:	Mine: Liggett No. 5

DECISION

Appearances: Matt S. Shepherd, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
James F. Bowman & George R. Bowman, Midway, West Virginia, on behalf of Liggett Mining, LLC.

Before: Judge Paez

The above-captioned proceedings are before me upon petitions for the assessment of civil penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815. The Secretary charges Liggett Mining, LLC ("Liggett Mining") with three violations of mandatory standards and proposes civil penalties of $7,174 for these violations.

I. Statement of the Case

The Commission received the Secretary's petitions for the assessment of civil penalties pertaining to the citations at issue on October 21, 2008. Liggett Mining timely contested the citations. These consolidated cases – Docket Nos. KENT 2008-1533 and KENT 2008-1534 – were assigned to me on August 13, 2009. I approved the partial settlement of seven of the ten violations comprising these dockets on October 6, 2010. Thereafter, I held a hearing in Lexington, Kentucky, on December 2, 2010, on the three remaining citations at issue. The Secretary presented the testimony of three officials from the Mine Safety and Health Administration ("MSHA") who were the issuing inspectors of the citations in question:

Wendil Fuson (Tr. 16:10-24, 22:2-6), Roger A. Wilhoit (Tr. 93:11-20, 94:8-14), and George M. Jackson, Jr. (Tr. 123:6-18, 126:1-8). Liggett Mining called witnesses Jack Calloway, Superintendant at Liggett No. 3 mine (Tr. 171:17-19), and Roger Baker, Maintenance Foreman for Virginia Fuels, which serves the Liggett No. 5 mine. (Tr. 198:21-25.) The Secretary's post-hearing brief was received on February 1, 2011. Respondent's post-hearing brief was received on February 10, 2011.

Citation No. 8317048 charges Liggett Mining with violating 30 C.F.R. § 72.630(b) for its failure to maintain in operating condition the dust collection system on a roof bolting machine by allowing excessive dust to accumulate on the clean air side of the system. Citation No. 8317164 charges Liggett Mining with violating 30 C.F.R. § 72.630(b) for its failure to maintain the dust collection system on a roof bolting machine in permissible condition by allowing the vacuum pressure at the drill head to fall below minimum standards. Citation No. 8329466 charges Liggett Mining with violating 30 C.F.R. § 75.903 by failing to have a disconnecting device installed on the power supply cable of a welder. The Secretary submits that all three alleged violations should be evaluated as significant and substantial ("S&S").[1] The Secretary originally recommended that all three violations be assessed as moderately negligent, with proposed civil monetary penalties of $3,689 for Citation No. 8317048, $1,203 for Citation No. 8317164 and $2,282 for Citation No. 8329466. In her post-hearing brief, the Secretary now contends that findings of high negligence are warranted for Citation Nos. 8317048 and 8329466. Accordingly, the Secretary is seeking an increase in civil monetary penalties for these two violations above their originally proposed assessments.

II. Issues

Liggett Mining denies the alleged violations in this matter. Specifically, Liggett Mining contends that the cited conditions do not constitute violations of the Secretary's mandatory health or safety standards. Accordingly, the issues before me are: (1) whether the conditions cited violated the health or safety standards as they have been set forth by the Secretary; (2) whether the Secretary's designations of these violations as S&S are supported by the record; (3) whether the Secretary's designations regarding the level of Liggett Mining's negligence in committing these alleged violations are supported by the record; (4) whether Liggett Mining received fair notice of the requirements under 30 C.F.R. § 72.630(b) as they pertain to Citation No. 8317164; and (5) whether the proposed civil penalties are appropriate.

[1] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

III. Background and Findings of Fact

A. Operations of Liggett Mining

Liggett Mining operates both strip and underground mines in Tennessee, Kentucky, and Virginia. (Tr. 21:2-3.) The Liggett No. 3 and No. 5 mines are operations of Liggett Mining located in Harlan country in the town of Liggett, Kentucky. (Tr. 19:21-20:9, 95:22–96:6.) The mines run two production shifts and one maintenance shift per day. (Tr. 20:17-20, 96:16-17.)

The Liggett No. 3 mine has one working section. (Tr. 20:10-12.) In 2008, there were five headings in the section where active mining took place, also known as the face. (Tr. 24:5-6.) The working section at Liggett No. 3 is a mechanized mining unit ("MMU") that operates a continuous miner, shuttle cars, and a roof bolting machine. (Tr. 20:13-16.) The ventilation plan in effect for Liggett No. 3 in July 2008 stipulated that air flow must be maintained at the rate of 3,000 cubic feet per minute for 5 feet behind the roof bolter. (Tr. 43:18-44:25.) The air is supposed to flow away from the entry and towards the working face where coal is extracted. (Tr. 44:15-45:5.) The entry at heading #2 in the mine was five-and-a-half to six-feet tall and twenty-feet wide. (Tr. 179:22-25.) Thus, at the minimum air flow, dust particles in the air of entry #2 would move at a rate of 30 to 34 feet per minute. (Tr. 181:3-8.)

B. Mechanics of the Lee Norse Roof Bolter

The Lee Norse twin-head roof bolting machine has two large rock drills, one on each of its sides at the front end of the machine. (Tr. 28:24-25; Ex. G-4.) Hydraulic booms press the drill into the roof of the mine. (Tr. 29:1-2.) At the end of each drill head is a drill steel piece with a component containing two holes, which are used for dust collection. (Tr. 29:2-5.)

When the dust collection system is in operation, vacuum pressure pulls the dust generated from drilling through the two holes at the drill head. (Tr. 29:6-8.) The dust travels through the drill steel and the drill head, and then through a dust hose that brings it to the dust collection system. (Tr. 29:8-12.) On each side of the machine, contaminated air travels through filters, and clean air exits the machine as exhaust through the mufflers to relieve pressure from the vacuum pumps. (Tr. 29:12-17, 33:11-13.) The filtered dust is collected in the dust boxes of the dust collection system. (Tr. 30:4-7.) These boxes are periodically emptied. (Tr. 30:6-10.) The top of the dust collection box marks the beginning of the "clean air" side of the dust collection system. (Tr. 32:24-33:1.) A hose connects the top of the dust box to a blower motor. (Tr. 189:21-24.) The blower motor is connected to the muffler by a second hose. (Tr. 189:21-24.) No dust should be in the hose between the filter and the muffler. (Tr. 32: 22-24.) The clean air side of the system runs from the top of the dust collection box to the exhaust, and includes the muffler. (Tr. 32:24 – Tr. 33:1.)

Respirable dust should not exit through the exhaust system of the roof bolter. (Tr. 30:1-3, 33:3-13.) Dust in the clean air side of the system indicates that the filter is being bypassed. (Tr.

42:16-20.) Such bypass of the filter is the result of a malfunction within the roof bolter, such as a torn filter or inadequate seal. (Tr. 42:16-20.) Respirable dust is briefly emitted into the air when the roof bolter is first put into operation before the vacuum pressure can travel to the drill head, but it dissipates in a matter of seconds. (Tr. 33:25-34:4.)

One purpose of the vacuuming system on a roof bolter is to prevent the operator from inhaling dust as the drill penetrates the mine roof. (Tr. 104:2-22.) A qualified person designated by the operator is required to perform a dust parameter check on the roof bolter at the beginning of every shift. (Tr. 48:5-49:3.) A small amount of dust may pass through the filter, but during the dust parameter check any dust accumulation in the dust collection system should be detected and eliminated. (Tr. 48:14-18, 81:17-82:12.) Additionally, a vacuum pressure reading should be done as part of the dust parameter check. (Tr. 109:14-16.)

C. The Roof Bolter Dust Collection Citations

1. Citation No. 8317048 at Liggett No. 3 Mine

Citation No. 8317048 was issued by Inspector Fuson on July 24, 2008 at 7:35 a.m. (Tr. 22:5-6), during a shift at the Liggett No. 3 mine that began at 6:00 a.m. (Tr. 176:12). The citation resulted from a regular quarterly E01 MSHA inspection. (Tr. 22:14-23:1.) On the date of the inspection, Fuson traveled with mine superintendent Jack Calloway to the working section. (Tr. 23:23-24:8.) The inspection began with an imminent danger run, which is a visual inspection of each working area for hazards. (Tr. 24:1- 4.) Fuson and Calloway began at heading #5 and progressed along the headings in descending order. (Tr. 24:15-20.) Fuson did not observe any violations prior to reaching heading #2. (Tr. 24:15-20.) However, as Fuson and Calloway traveled from entry #3 to entry #2, they observed dust blowing out of entry #2. (Tr. 24:18-20). The dust rolling out of the entry indicated there was negative pressure from airflow. (Tr. 45:15-17.) Fuson testified that if the airflow was being maintained in accordance with the mine's ventilation plan, then 3,000 cubic feet of air per minute would be creating positive pressure, blowing the dust towards the coal face and not out the entry. (Tr. 44: 15-20.)

Fuson observed a haze of dust when he shined his helmet light into the entry. (Tr. 43:1-7.) The dust in the air appeared to have the thickness of fog. (Tr. 43:1-7.) When the inspection party reached the entry, Calloway flagged the men operating the Lee Norse twin-head roof bolting machine in the heading to turn it off. (Tr. 24:21-23, 26:10-12.) When the inspection party came to heading #2, there were three miners in the entry.[2] (Tr. 26:2-3.) These men were not wearing any breathing protection. (Tr. 28:4-7.) The roof bolter was de-energized by one of the men hitting the panic bar on the machine. (Tr. 37:8-11.)

[2] Respondent's witness, Calloway, testified there were two men working on the roof bolter. (Tr. 177:24-25.) However, it is unclear from his testimony whether those were the only men in the entry. Additionally, Fuson noted in the citation that three people were affected by the violation. (Ex. G-1.) Liggett has not disputed this determination by the inspector.

At the time of the inspection, heading #2 was approximately 50 to 70 feet deep. (Tr. 26:13-24.) The roof bolter was located at the far end of the entry, directly at the coal face, putting the back of the machine at 40 to 50 feet away from the last open crosscut where Fuson and Calloway had entered the heading. (Tr. 27:15-28:3.) Upon inspecting the roof bolter, Fuson found that the filters had been changed on both sides of the machine. (Tr. 37:24-38:8.) Also, the lids of the dust box were wet and clean, indicating that they had been washed. (Tr. 38:19-22.) However, the clean air side of the dust collection system was lined with dust accumulation from the lid of the dust box, through the dust hose, and exiting out of the muffler. (Tr. 39:2-15.) The inspector determined that the amount of dust in the roof bolter indicated that the hazardous accumulation had been developing for at least one shift of eight hours with the roof bolter in operation, exposing miners to dust for that duration. (Tr. 49:9-18, Tr. 81:1-8.) *See* discussion *infra* Part V.A.1. After inspecting the roof bolter, Fuson issued the citation at 7:35 a.m., and gave the operator one hour to abate the condition. (Tr. 22:5-6, 39:19-21.) The citation was terminated over an hour later at 9:20 a.m. because Fuson was engaged in other inspection activities. (Tr. 39:23-40:5.) At the time the citation was terminated, dust was no longer blowing from the muffler. (Tr. 40:6-10.) The citation had been abated by pouring two to three gallons of water down the drill head on each side of the bolter, and letting the water run through dust collection system. (Tr. 184:10-16.)

2. Citation No. 8317164 at Liggett No. 5

Inspector Wilhoit issued Citation No. 8317164 at the Liggett No. 5 mine on June 23, 2008, as the result of a regular inspection. (Tr. 96:23-97:14.) When Wilhoit examined the roof bolting machine in question, it was on the section face and most likely in use. (Tr. 98:15-21.) As is standard, the Lee Norse roof bolter had an approval plate on it that specified the minimum required vacuum pressure for the drill. (Tr. 99:2-17.) The plate had "MSHA" printed on it. (Tr. 99:18-19.) The approval plate stated that the minimum pressure for the cited drill was 15 inches mercury ("Hg"). (Tr. 99:10-14.) A clean roof bolter is supposed to pull this amount of pressure at its drill head. (Tr. 215:15-18.)

To take the vacuum pressure reading, Wilhoit asked the mine operator to back the roof bolter out of the coal face. (Tr. 100:5-11.) The drill was left running. (Tr. 100:5-11.) Wilhoit used a vacuum gauge to take the reading. (Tr. 100:5-16.) He inserted the vacuum gauge in the drill pot, which is the part of the roof bolter where the drill steel is used to pierce the roof surface. (Tr. 100:5-16.) Taking these readings at the drill pot is in accordance with MSHA issued guidelines. (Tr. 102:13-103:18.) The vacuum gauge has a rubber gasket at its bottom that seals the gauge to the drill in such a manner that no pressure escapes. (Tr. 100:22-101:5.) Wilhoit did not observe any visual signs that the vacuum pressure was performing below the 15 Hg minimum standard. (Tr. 120:3-6.) However, after conducting a vacuum gauge reading on the left side of the drill head, Wilhoit obtained a reading of 11.5 Hg. (Tr. 101:12-13.) When Wilhoit terminated the citation, the vacuum pressure reading had risen to 19.5 Hg. (Tr. 106:4-7.) The citation was issued at 11:55 a.m., and terminated at 1:40 p.m. (Ex. G-6.)

Wilhoit has previously allowed operators to empty the dust box on the roof bolter prior to taking vacuum gauge readings if they requested to do so. (Tr. 112:10-13.) In preparing the roof bolter for a vacuum pressure test, the manufacturer recommends emptying the dust box. (Tr. 200:16-19.) A full dust box will decrease the vacuum pressure on the roof bolter. (Tr. 205:20-24.)

D. The Use of Disconnecting Devices

The power center of a section is an area where high voltage electricity comes into the mine and goes through a transformer that distributes power to equipment on the section. (Tr. 128:14-19.) A welder is a piece of equipment that receives power from the power center (Tr. 128:16-19) and is used to make miscellaneous repairs on equipment. (Tr. 138:8-13.) It is most frequently utilized during the maintenance shift but can be used at any time. (Tr. 138:8-13.) A welder has the form of a box, approximately 2 feet in length, 18 inches in height, and 1 foot in width. (Tr. 129:10-19.) A power cable extends from one end of the welder and connects it to the power source. (Tr. 129:20-24.) The welder at issue utilized a No. 10 power cable. (Tr. 130:3-6.) This cable is also referred to as a "10/5" cable. (Tr. 128:3-7.) It contains five lead wires (three phase leads, a ground lead, and a monitor lead) that are No. 10 in size. If a disconnecting device is used, it will be attached at the end of this power cable. (Tr. 130:7-10.) A cathead acts as the disconnecting device on the welder. (Tr. 127:15-17.) It has a two-pronged "male end" that connects to a receptacle "female" counterpart on the power source. (Tr. 131:7-10.)

It is also possible to use the welder without a disconnecting device. (Tr. 131:5-12.) The welder's wires can be jerry-rigged by folding the phase lead wires that conduct power in the cable to make them fit directly into the receptacle on the power source. (Tr. 131:10-18.) Thus, when the "phase leads" on a welder are not connected to a cathead, the welder can be powered by inserting these leads into an electrical component of a piece of machinery anywhere in the mine that is producing the requisite amount of voltage, such as a shuttle car, roof bolter, or head drive. (Tr. 134:22-135:5.) This practice allows miners to power equipment, such as a welder, when they are far from the power center without having to run as much as 500 feet of cable between the equipment and the power center. (Tr. 142:3-14.) Using equipment without a cathead further saves miners time because they avoid having to change the cathead on their equipment to match the size of the receptacle on the power center they are working near. (Tr. 142:23-143:3.) Although using equipment without a cathead is faster, doing so creates a risk of electrocution if power is running through the electrical source at the time the welder is connected to it. (Tr. 135:6-15.)

In general, operating electrical equipment without a cathead creates a hazard because cables can easily be pulled out or fall out from the power source, resulting in a flash of electricity or the electrocution of a miner upon accidental contact. (Tr. 132:14-17.) The cathead contains a locking mechanism that decreases the risk of the power cable being pulled out by locking the cathead to the receptacle. (Tr. 139:1-5.) If the cable is pulled out, then the monitor wire will break and the breaker will go into effect. (Tr. 139:10-15.) As a result, the power will go off and

an arc will be prevented when using a cathead. (Tr. 139:16-18.) Indeed, in the absence of a cathead, if bare phase leads were pulled out of a power source, an arc would be created that resembles a small explosion. (Tr. 140:13-18, 141:14-19.) The accidental disconnection of a power cable is of concern in the tight mining environment, where people can stumble and trip on the cable. (Tr. 139:5-8.)

In addition to containing three phase leads, the power cable contains a ground lead and a monitor lead. (Tr. 131:15-132:1.) The ground and monitor leads provide protection from electrocution when equipment is plugged into a power center using a cathead. (Tr. 132:1-134:3.) The monitor lead is needed for the breaker to be responsive to a failing ground connection. (Tr. 132:3-5, 133:22-134:1.) The monitor lead, ground lead, and breaker all function in such a manner that allows the breaker to cut off power if the ground connection is lost or malfunctioning. (Tr. 133:22-134:1.)

However, if the power cable is being used without a cathead, then the ground monitor system can be bypassed and made ineffective. (Tr. 132:9-133:14.) This is done by splitting the ground lead and inserting one end into the ground receptacle and the other into the monitor. (Tr. 132:9-133:14.) When the monitor is bypassed, the breaker will not take effect if a miner bumps the phase lead, touches it, or even grabs it. (Tr. 134:4-10.) Power will continue to flow through the phase lead, creating the risk of an electric flash should the lead be pulled out. (Tr. 134:11-12.) Alternatively, a ground wire may also be split to facilitate the use of a wireless ground monitor system by eliminating the need for a jumper cable between the ground and the monitor. (Tr. 223:11-22.)

E. Citation No. 8329466 at Liggett No. 5

Inspector Jackson issued Citation No. 8329466 at the Liggett No. 5 mine on August 2, 2008, while inspecting the mine due to an unrelated hazard complaint. (Tr. 126:6-19.) The inspection took place during the second of two production shifts that last nine hours. (Tr. 152:7-11.) The second shift ran from 3:00 p.m. to midnight. (Tr. 152:7-11.) Jackson issued the citation in question at 10:05 p.m. (Tr. 152:1-4.) During the inspection, Jackson walked to the section power center. (Tr. 128:10-11.) While inspecting conditions at the coal face, Jackson observed a 480-volt welder without a disconnecting device attached to its power cable. (Tr. 128:21-25, 129:4-5, 143:19-20.) The exposed end of the power cable was 5 feet from the receptacle of the power center for an active section. (Tr. 137:5-8, 137:18-21.) The phase leads on the welder's power cable were loose with approximately 1 inch of bare copper exposed. (Tr. 130:13-15, 131:15.) These wires were also folded over and mashed in such a manner that would permit them to be inserted into a power source without a cathead. (Tr. 130:17-131:15.) The ground lead was split. (Tr. 131:21-23.) The monitor lead was cut approximately seven inches. (Tr. 132:5-6.) The welder was not tagged out, and was laying in open view. (Tr. 137:8.) Additionally, conditions in the section were wet. (Tr. 146:19-22.) Jackson issued the citation at 10:05 p.m., which was abated within 25 minutes when a cathead was spliced to the welder's power cable. (Tr. 158:1-15.)

F. Citations at Issue in this Proceeding

1. Citation No. 8317048 – Failure to maintain a dust collector in operating condition

Fuson issued Citation No. 8317048 under section 104(a) of the Mine Act for a violation of 30 C.F.R. § 72.630(b). (Ex. G-1.) The citation's narrative states:

> On the MMU-003 working section, the dust collecting system on the co [sic] #20914 Lee Norris [sic] twin-head return side bolting machine is not being maintained in permissible and operating condition. Upon entering the #2 heading, the roof bolting machine was barely visible from the float rock dust coming out of the exhaust mufflers, there were 3 miners in this area, not wearing any breathing protection. The operator Jack Callaway [sic] stop [sic] the machine and ordered the machines dust collection system to be flushed with water to remove the float dust from the system. New bags had been installed but the excessive dust build in the system was massively being disbursed into the atmosphere.

Fuson asserts that three people were affected by this condition and that permanently disabling injuries were reasonably likely. (*Id.*) Fuson charged Liggett with moderate negligence and assessed the violation as significant and substantial ("S&S"). (*Id.*)

2. Citation No. 8317164 – Failure to maintain a dust collector in operating condition

Wilhoit issued Citation No. 8317048 under section 104(a) of the Mine Act for a violation of 30 C.F.R. § 72.630(b). (Ex. G-6.) The citation's narrative states:

> The dust collection system on the Lee Norse twin-head drill (return side), S/N 21981, being operated on the 001/MMU is not being maintained in permissible condition. When checked with a vacuum ga[u]ge a reading of 11.5 in. HG. was obtained on the left side drill head. A vacuum ga[u]ge reading of 15 in. HG. is required. This condition would cause the left side drill operator to breathe an excess amount of dust while drilling the mine roof. Two miners operate the left side of the drill daily on the 001/MMU.

Wilhoit asserts that one person was affected by this condition and that permanently disabling injuries were reasonably likely. (*Id.*) Wilhoit charged Liggett with moderate negligence and assessed the violation as S&S. (*Id.*)

3. Citation No. 8329466 – Failure to install a disconnecting device on a welder power cable

Jackson issued citation No. 8329466 under section 104(a) of the Mine Act for a violation of 30 C.F.R. § 75.903. (Ex. G-9.) The citation's narrative states:

> There is no disconnecting device installed in the cable supplying 480 volts to the Miller Maxstar welder located on the 002 MMU. The three phase leads have approximately 1" of bare copper exposed at the power supply end, and give the appearance that they have been jammed in a power source. The ground wire also has bare copper exposed. The condition poses a hazard to miners in that it subjects them to electrocution when coming in contact with bare open copper wires used to supply 480 volts to this welder.

Jackson asserts that one person was affected by this condition and that fatal injuries were reasonably likely. (*Id*.) Jackson charged Liggett with moderate negligence and assessed the violation as S&S. (*Id*.)

G. Credibility of the Secretary's Witnesses

1. Wendil Fuson, Health Specialist, MSHA

Wendil Fuson is employed by MSHA as a federal mine inspector in Barbourville, Kentucky. (Tr. 15:5-14.) At the time of the July 24, 2008 inspection of Liggett Mine No. 3, Fuson held the title of Coal Mine Inspector. (Tr. 16:23-24.) He has subsequently obtained the title of Health Specialist since May of 2009. (Tr. 16:25-17:1.) Fuson has been employed by MSHA since April of 2007. (Tr. 17:2-3.) Before joining MSHA, Fuson had been employed in the mining industry since 1980, with close to 20 years of experience in the industry. (Tr. 17:4-10.) He has spent the majority of his career, eight to twelve years, operating a roof bolter. (Tr. 17:18:24.) Fuson has exclusively worked at underground mines. (Tr. 17:25-18:1-2.) Fuson was certified by the state of Kentucky as a foreman, a position he held for ten years. (Tr. 18:8-16.) Upon joining MSHA, Fuson underwent a 25-week training program at the Beckley Mine Academy, in addition to 18 to 24 months of on-the-job training. (Tr. 18:19-25, 19:1-2.) His training at the Beckley Mine Academy included instruction on how to inspect underground mines, and specific instruction on how to inspect a dust collection system on a roof bolter. (Tr. 19:6-17.) Additionally, prior to the date of inspection, Fuson had been to Liggett No. 3 on multiple occasions, including during his time as a trainee. (Tr. 23:14-17.)

At the time Fuson inspected Mine No. 3 in 2008, he had limited experience as an inspector. However, his frank testimony and his significant years of experience in the mining industry as a roof bolter operator give him great credibility. Accordingly, I afford great weight to his testimony.

2. Roger A. Wilhoit, Special Investigator, MSHA

Roger A. Wilhoit has worked in the mining industry since 1973. (Tr. 93:22-24.) He has held several positions in underground mining operations including roof bolter and foreman. (Tr. 94:2-15.) Wilhoit has been employed by MSHA since 2002. (Tr. 93:16-17.) He has held the

title of Special Investigator for two years. (Tr. 93:14-15.) Wilhoit had the title of Coal Mine Inspector at the time Wilhoit inspected Liggett No. 5 in 2008. (Tr. 93:18-20.) Upon starting at MSHA, he underwent approximately 25 weeks of training at the Beckley Mine Academy. (Tr. 95:1.) He received additional on-the-job training in inspection of roof bolter dust control systems. (Tr. 95:15-18.) Prior to June 2008, Wilhoit had previously taken vacuum pressure readings on roof bolters. (Tr. 102:2-5.) Due to Wilhoit's extensive experience in the mining industry and relevant experience at MSHA, I give substantial weight to his testimony.

3. George M. Jackson, Coal Mine Inspector, MSHA District 7 Field Office

George M. Jackson has ten years of experience in the underground coal mining industry. (Tr. 124:23-125:3.) During his career he had been employed by Liggett Mining. (Tr. 164:8-9.) Jackson worked as a section electrician for two years. (Tr. 124:1-2.) Jackson is currently a certified electrician and obtained this certification prior to the 2008 inspection in question. (Tr. 124:3-22.) Additionally, after he joined MSHA in 2007, he received additional training on electricity and electrical examinations at the Beckley Mine Academy and through on-the-job training. Based on Jackson's familiarity with Liggett Mining and his specialized experience in the electrical field, I give significant weight to his testimony.

H. Credibility of Respondent's Witnesses

1. Jack Calloway, Superintendant, Liggett No. 3 Mine

Jack Calloway is the superintendant of the Liggett No. 3 mine and has held this position for three years. (Tr. 171:17-22.) Calloway has approximately 30 years of experience in the mining industry. (Tr. 171:9-11.) He holds several certifications, including Kentucky foreman certification and dust sampler certification. (Tr. 171:12-16.) Calloway is an experienced miner and demonstrates substantial knowledge on the general operation of Liggett No. 3. However, Calloway declined to give specific assessments on the condition of entry #2 and the cited roof bolter at issue. (Tr. 194:20-196:3.) I found this aspect of his testimony to be vague and guarded. As such, I give significant weight to Calloway's testimony on the general operating procedures at Liggett No. 3, but I do not give significant weight to his testimony on the specific conditions in the mine on the date of inspection.

2. Roger Baker, Maintenance Foreman, Virginia Fuels

Roger Baker is a Maintenance Foreman at Virginia Fuels, which provides maintenance services for Liggett Mining. (Tr. 197:18-19, 198:23-25.) Baker has approximately 33 years of experience in the mining industry and has held the position of Maintenance Foreman for 20 years. (Tr. 198:7-9, 198:18-20.) Liggett Mining was under his authority in 2008. (Tr. 198:23-25.) However, Baker was not present at the inspections in question at Ligget No. 5. (Tr. 214:11-21, 221:6-9.) Due to the candor and precision of his technical accounts, I give great weight to his testimony on the operation at Liggett No. 5, as well as the mechanics of the equipment in

question. However, because Baker was not present at either inspection at Liggett No. 5, I give very little weight to his testimony regarding the conditions and events surrounding the specific citations at issue.

IV. Principles of Law

A. Strict Liability under the Mine Act

Under the Mine Act, operators are held to a strict standard of liability for violation of mandatory safety standards. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008) (citing *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (Nov. 1986), *aff'd*, 868 F.2d 1195 (10th Cir. 1989)). Thus, a mine operator is liable for violations under the Mine Act, regardless of its level of fault. *Id.*

B. Significant and Substantial

A violation is considered S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or an illness of a reasonably serious nature." *Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). However, the S&S designation does not require the violation to "be so grave as to constitute imminent danger" or "a condition that could reasonably be expected to cause death or serious physical harm before the condition is abated." *Id*. at 828. To establish a violation is S&S, the Secretary must prove:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (citing *Nat'l Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981)); *accord Buck Creek Coal v. MSHA*, 52 F. 3d 133, 135 (7th Cir. 1995); *see also Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria). The Commission has clarified its position on the third element of the *Mathies* test in that,

> the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (Aug. 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis in original).

U.S. Steel Mining Co., 7 FMSHRC 1125, 1129 (Aug. 1985). Further, a determination that a violation is S&S must be made assuming normal mining operations. *Id.* at 1130.

C. Negligence

Under section 110(i) of the Mine Act, an Administrative Law Judge is required to consider the operator's negligence in assessing a civil penalty. 30 U.S.C. § 820(i). Each of the Secretary's mandatory standards carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty if a violation occurs constitutes negligence. *A.H. Stone Co.*, 5 FMSHRC 13 (Jan. 1983).

D. Fair Notice

The Commission has stated that in civil penalty proceedings, considerations of due process prevent the enforcement of regulatory interpretations where such enforcement would validate an application of the regulation that fails to give fair notice of its requirements. *Wolf Run Mining Co*., 32 FMSHRC 1669, 1682 (Dec. 2010). The Commission has further summarized the standard for fair notice as follows:

> The Commission's test for notice under the Mine Act is "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). In deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors is relevant, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question.

Id. at 1682 (citations omitted).

E. Regulatory Interpretation

Substantial and broad deference is given to the Secretary's interpretation of her own regulations. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citations omitted). The Commission has explained the standard for deference to the Secretary's interpretation of her regulations as follows:

> Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the

> words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co*., 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co*., 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec'y of Labor v. Western Fuels-Utah, Inc*., 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation of its own regulation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'" (quoting *Bowles v. Seminole Rock & Sand Co*., 325 U.S. 410, 414 (1945)) (other citations omitted). The Secretary's interpretation of her regulations is reasonable where it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). . . . Additionally, "a regulation must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute it implements." *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (citation omitted).

Lodestar Energy, Inc., 24 FMSHRC 689, 692 (July 2002).

V. Legal Analysis, Further Findings of Fact, and Conclusions of Law

A. Citation No. 8317048

1. Violation

The pertinent language in 30 C.F.R. § 72.630(b) sets forth the requirement that "dust collectors shall be maintained in permissible and operating condition." The text of Citation No. 8317048 states that the Lee Norse twin-head return side bolting machine was not being maintained in either a permissible or operating condition. (Ex. G-1.) However, in presenting her case, the Secretary limits her allegations of violation to the operating condition of the machine and not to its permissible state. (Sec'y Br. 5.) Accordingly, my analysis shall only focus on whether the dust collection system on the Lee Norse twin-head return side bolting machine was in operating condition.

The plain use of the word "operating" is synonymous with "functional", a word defined as "performing or able to perform its regular function." *Webster's Third New Int'l Dictionary* (Unabridged) 921, 1581 (2002). The regular function of the dust collection system is to absorb air contaminated with dust at the drill head, filter and contain the dust before it reaches the clean side of the system, and produce clean air on the return side of the machine. (Tr. 29-32.) The roof bolter in question was not able to perform these regular functions on the day of Fuson's inspection. The machine emitted a visible dust cloud as Fuson approached heading #2 where it was located. (Tr. 24:18-20.) Furthermore, dust lined the entirety of the "clean side" of the

system, from the lid of the dust box to the muffler from which air exited the system. (Tr. 39:2-15.) The presence of dust on the clean side of the machine indicated that the filter was being bypassed. (Tr. 42:16-20.) The weight of the evidence establishes that the dust collection system was not performing its regular function.

Respondent argues that despite these conditions it did not violate the Secretary's mandatory safety standard because the cited machine was not engaged in production at the time of inspection; rather, the machine was undergoing maintenance to correct the problem. (Resp't Br. 9.) No roof bolting had occurred in heading #2 that morning. (Tr. 173: 9-10.) However, this argument holds little weight given Fuson's testimony that the amount of dust accumulated on the clean side of the machine indicated the roof bolter had been running for at least one full eight-hour shift or longer with a faulty dust collection system, exposing miners to the resulting hazard for the duration of the machine's period of operation. (Tr. 49:9-18, 81:1-8.) Despite Calloway's speculation as to the possible immediate sources of dust accumulation, I give great weight to the consistent and certain testimony of Inspector Fuson that the hazard existed for a minimum of one shift, particularly given that Respondent's witness, Calloway, was unable to assess the duration of the condition or provide any persuasive indication that Fuson's assessment was not accurate. (Tr. 195:19-196:3.) Accordingly, I reject Respondent's argument, and determine that a violation of 30 C.F.R. § 72.630(b) did occur.

2. Gravity and S&S

As discussed above, the Secretary has established that a violation of a mandatory safety standard has occurred, satisfying the first element of the *Mathies* test. As to the remaining elements, both Fuson and Calloway testified that a haze of dust was present in the entry where the roof bolter was located. (Tr. 43:1-7, 177:13-16.) Fuson testified that he believed injury was likely to occur if the violation was allowed to persist. (Tr. 83:5-11). In testimony on a subsequent respirable dust citation in this matter, Wilhoit testified that injuries most commonly associated with excessive respirable dust exposure are permanently disabling conditions, such as silicosis and black lung disease. (Tr. 118:22-25.) These conditions deteriorate a miner's ability to breathe over a period of time. (Tr. 118:22-119:2.)

The testimony of Inspector Wilhoit is consistent with the Secretary's statements in the preamble to 30 C.F.R. § 72.630 as cited in *White Buck Coal Co*., 30 FMSHRC 535, 542 (June 2008) (ALJ). (Sec'y Br. 6-7.) In explaining the need to protect miners from harmful respirable dust, the Secretary's preamble notes that, "the development of silicosis and pneumoconiosis among underground coal miners has been well documented, particularly among roof bolters." *Air Quality Standards for Abrasive Blasting and Drill Dust Control*, 59 Fed. Reg. 8318, 8322 (Feb. 18, 1994). In the same document, the Secretary provides a detailed description of the serious nature of such respiratory illness as follows:

> Exposure to silica is a significant health hazard in abrasive blasting and in drilling. When workers inhale silica, the lungs react by developing fibrotic

> nodules and scarring around the trapped silica particles. This condition is known as silicosis and can result in respiratory difficulty and eventually death. Symptoms associated with silicosis include shortness of breath, fever, and cyanosis. Severe fungal or mycobacterial infections, such as tuberculosis, often cause complications and may be fatal. Dust-impaired macrophages can no longer function effectively in fighting disease by killing mycobacteria and other organisms.

Id. at 8319. Here, the violation exposed miners to the risk of increased dust inhalation. This hazard could result in respiratory illness of a serious nature. Accordingly, the second and fourth elements of the *Mathies* test are satisfied.

The third *Mathies* element remains at issue. Injury must be reasonably likely to occur due to the emitted dust for the violation to be S&S. Respondent argues that the violation cannot be S&S because evidence presented at trial demonstrates that visible dust was present for less than two minutes. (Resp't Br. 10.) However, I do not find ample evidence supporting this proposition or that it would be dispositive here. The extent of the hazard in question is not limited to the visible dust cloud observed by Fuson. Rather, it includes the build-up of dust in the clean air side of the roof bolting machine during previous shifts when air was flowing through that build-up of dust and out into the mine. As previously discussed, I find that the evidence indicates the machine in question had been running for at least one full eight-hour shift, if not more, with a faulty dust collection system. (Tr. 49:9-18, 81:1-8.) Employees would have been exposed to the dust hazard for the duration that the machine was in operation. (Tr. 81:1-8.) For these reasons, I reject Respondent's assertion that the hazardous condition only existed two minutes.

Further, the Secretary's preamble to the final rule on air quality explains, "[d]uring abrasive blasting and drilling, there is the potential for extremely high exposures [to dust] in short periods of time to both the miners doing the abrasive blasting or drilling and to other miners in the immediate area." 59 Fed. Reg. at 8318. (*See* Sec'y Br. 6-7.) Even brief exposure can lead to injury. In this instance, the miners in the vicinity of the hazard were not wearing breathing protection. (Tr. 28:4-7.) Additionally, in the months prior to the inspection the roof bolting machine in question had been put on "designated area" status by MSHA as a protective health measure due to high levels of quartz in its dust samples. (Tr. 72:1-15.) Given the totality of the circumstances, injury was reasonably likely to occur as a result of the dust hazard. I determine that the third *Mathies* element is satisfied.

3. Negligence

The operator is required to perform a dust parameter check on the roof bolter before production begins if the section had been idle in the prior shift. 30 C.F.R. § 75.362(a)(2). During this check, the problems with the dust collection system should be detected and eliminated. (Tr. 48:14-18.) The shift began at 6:00 a.m. (Tr. 48:8-11.) The citation was issued

at 7:30 a.m. (Tr. 48:12-13.) However, no production was yet underway in heading #2. (Tr. 178:13-16.) Respondent argues that because the morning shift had been preceded by an idle shift, the operator had not breached its duty to inspect yet. (Resp't Br. 4.) Nevertheless, the pre-shift examination is a minimum requirement, and the operator is required to make further inspection when necessary. 30 C.F.R. § 75.362(a)(2). Given the extent of the dust accumulation and its visible emission from the roof bolter, the operator should have been on notice of the condition well before the pre-shift examination.

Further, even if this maintenance was being performed as part of a pre-shift exam, the operator was still under a duty per its ventilation plan to conduct this maintenance downwind from miners in an area with good airflow. (Tr. 87:21-88:8.) The amount of dust in entry #2 upon Fuson's arrival indicates that the ventilation was inappropriate for this maintenance activity. (Tr. 88:4-6.) As these requirements for safe maintenance were in Liggett's ventilation plan, both the operator and its employees should have been on notice. Indeed, the manner of undertaking the machine's maintenance was in itself negligent.

The Secretary initially assessed that Ligget mining was moderately negligent, but in her post-hearing brief she asserts that Ligget is liable for high negligence. By the Secretary's definition, moderate negligence occurs when the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances. 30 C.F.R. § 100.3(d) (Table X) (2008). High negligence is distinguished by the Secretary in that there are no mitigating circumstances. *Id*.

Here, the violation was discovered while the operator was acting to remedy the situation. Moreover, the filters on the roof bolter had been changed, and the lid of the dust box had been washed. (Tr. 37:24-38:8.) The operator's attempt to remedy the condition, albeit rather late, is a mitigating factor. Consequently, I conclude that Liggett Mining was moderately negligent in committing this violation.

4. Civil Penalties

Section 110(i) of the Mine Act requires the Administrative Law Judge to consider six criteria in the assessment of a civil penalty: the operator's history of previous violations, the appropriateness of the penalty to the size of the operator's business, the operator's degree of negligence, the penalty's effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary originally proposed a penalty of $3,689 for this violation. The parties have stipulated that Liggett Mining is a moderate sized operator. (Ex. J-1.) They have further stipulated that Liggett Mining's ability to remain in business will not be affected by the proposed penalty. (*Id*.) The operator was issued 16 citations for violations of 30 C.F.R. § 72.630(b) in the last 24 months. (Ex. G-11.) This history was properly weighted in the Secretary's original

proposal, in accordance with 30 C.F.R. § 100.3(c). My determinations on negligence and gravity are consistent with the Secretary's originally proposed assessment. Additionally, the operator's swift abatement demonstrates a good faith effort to comply with the standard. In considering all the relevant factors, I hereby assess a civil penalty of $3,689.

B. Citation No. 8317164

1. The Violation

The pertinent language of 30 C.F.R. § 72.630(b) states,

> [d]ust collectors shall be maintained in permissible and operating condition. Dust collectors approved under Part 33—Dust Collectors for use in Connection with Rock Drilling in Coal Mines of this title . . . are permissible dust collectors for the purpose of this section.

Under 30 C.F.R. § 33.11, dust collectors are required to bear an approval plate to indicate their permissible status. Additional precautions necessary for maintaining the unit in an approved condition may be added to the plate at MSHA's direction. 30 C.F.R. § 33.11(a).

The dust collection unit in question bore an approval plate that indicated MSHA required a minimum vacuum pressure of 15 Hg on the machine. (Tr. 99:2-19.) Wilhoit took a vacuum gauge reading at the drill pot on the left side of the drill head, which measured 11.5 Hg. (Tr. 100:17-101:13.) He subsequently issued a citation because the pressure at the drill pot was below 15 Hg. (Ex. G-6.)

Respondent argues it did not have fair notice that the vacuum pressure requirement was intended for the drill pot and not the relief valve.[3] (Resp't Br. 14.) The standard for fair notice is not actual notice, but rather whether a reasonably prudent person would have known the requirement of the standard. *Wolf Run*, 32 FMSHRC at 1682. As established during Wilhoit's testimony, the MSHA *Coal Mine Health Inspection Procedures Handbook*, Appendix E, clearly states that pressure readings can be taken at the drill pot. (Tr. 102:13-103:18; Ex. G-8.) No mention is made of the relief valve in the relevant section. This document is publicly accessible. A reasonably prudent operator would know and understand the enforcement procedures of MSHA to the extent they were disseminated in the public domain.

Respondent also argues that the standard only requires 15 Hg to be maintained under controlled conditions, emphasizing that the requirement only pertains to a dust collection unit when its dust box has been cleaned. (*See* Tr. 12:24-13:24.) Yet, no MSHA materials support

[3] The minimum relief valve pressure is 15 Hg, per the manufacturer's specifications. (Ex. R-2.)

this interpretation. Further, by Respondent's own admission, Liggett was aware this standard was not enforced under controlled conditions. (Tr. 13:14-24.) I do not find Respondent's interpretation of the standard persuasive.[4] Moreover, emptying the dust box is not a regular practice for MSHA inspectors taking vacuum pressure readings, and Respondent does not dispute that. (Tr. 13:14-24.) Therefore, I determine that Respondent had fair notice of the requirements of the standard under the Secretary's interpretation.

Ligget Mining was required to maintain 15 Hg at the drill pot at all times. It failed to do so in violation of 30 C.F.R. § 72.630(b).

2. Gravity and S&S

Liggett Mining has violated 30 C.F.R. § 72.630(b), satisfying the first *Mathies* element. Analysis of the second and fourth *Mathies* elements for this violation is the same as for the violation of this standard at the Liggett No. 3 mine. *See* analysis *supra* Part V.A.2. Failure to maintain the dust collection system on a roof bolter in accordance with the standard creates a discrete safety hazard in increasing miners' exposure to respirable dust. (Tr. 106:21-107:3.) If injury does occur as result of this exposure, it is reasonably likely to take the form of a serious respiratory condition, such as silicosis or black lung disease, both of which are likely to have permanently disabling effects. (Tr. 107:10-25.) Thus, I determine that the violation contributed to a discrete safety hazard, and that the there is a reasonable likelihood that injury resulting from that hazard would be of a serious nature, satisfying the second and fourth *Mathies* elements.

In order for the third *Mathies* element to be satisfied, injury must be reasonably likely to occur as a result of a hazard contributed to by the violation. The roof bolter operator stands directly beside the drill pot during the course of normal mining operations. (Tr. 104:13-19.) As he stands there, dust is generated when the drill pierces the mine roof. (Tr. 104:20-22.) If the vacuum pressure continues to operate at 11.5 Hg, the operator will inhale an excess amount of dust. (Tr. 105:18-22.) This exposure to the excess dust can lead to permanently disabling respiratory illness. (Tr. 105:20-24.) I do not find persuasive Respondent's argument that, in the absence of visual dust, this violation cannot satisfy the *Mathies* test. (Resp't Br. 19.) As Inspector Wilhoit testified, when the vacuum pressure on the roof bolting machine is not maintained at the appropriate level, less dust will go through the dust collection system. (Tr. 105:1-6.) As a result, more dust will remain suspended in the air. (Tr. 105:4-6.) Given the vacuum pressure was functioning at almost 25 percent below the minimum standard, and the operator's close proximity to the origin of the dust, I determine it is reasonably likely that the operator would be exposed to excess dust for at least a brief amount of time during the course of normal mining operation. *See Genwal Res. Inc.*, 27 FMSHRC 580, 589 (Aug. 2005) (ALJ) (persuasive authority finding that the presumption of exposure to respirable dust without a dust

[4] Respondent essentially argues that the standard should be changed so it only applies under controlled conditions. I decline Respondent's invitation to do so, as this issue is outside the scope of my authority.

sample was reasonable under the facts). As previously discussed, even brief exposure to excess respirable dust can reasonably lead to injury. The third *Mathies* element is satisfied. Consequently, I determine that this violation of 30 C.F.R. § 72.630(b) was S&S.

3. Negligence

Respondent was aware that not routinely maintaining a clean dust box would decrease the vacuum pressure on the roof bolter. (Tr. 205:20-24.) The 15 Hg requirement is a minimum standard. The pressure on the unit after the condition was abated rose to 19.5 Hg. (Ex. G-6.) Given the important function of the dust collection system in maintaining a safe work environment, the operator should have provided for adequate cleaning of the dust collection system as needed to prevent the pressure from falling below minimum standards. However, because there was no easily visible dust cloud or direct testimony of the operator's knowledge of this condition, the operator's actions do not rise to the level of high negligence in these circumstances. Therefore, I determine that Liggett Mining acted with moderate negligence.

4. Civil Penalty

The Secretary has proposed a civil penalty of $1,203. The parties have stipulated that Liggett Mining is a moderate sized operator and that its ability to remain in business will not be affected by the proposed penalty. (Ex. J-1.) My determination of moderate negligence is consistent with the Secretary's original proposal. I also find that injury was reasonably likely to occur as a result of this violation. The operator's abatement demonstrates a good faith effort to comply with the standard. Accordingly, I hereby assess a civil penalty of $1,203.

C. Citation No. 8329466

1. The Violation

The Secretary alleges that Liggett mining violated 30 C.F.R. § 75.903 by failing to have a disconnecting device attached to the power cable on a welder that was visibly disconnected from the power source. The standard requires that, "[d]isconnecting devices shall be installed in conjunction with the circuit breaker to provide visual evidence that the power is disconnected." 30 C.F.R. § 75.903. Under this standard, a disconnecting device should be attached to the welder. (Tr. 130:7-10.) The operator was aware that the Secretary enforces the standard to apply to idle welders not connected to a power source. (Tr. 212:19-213:2.) Therefore, I do not find that a novel issue of regulatory interpretation arises under these facts.[5]

[5] Yet, if there were an issue of regulatory ambiguity, the Secretary's interpretation would nonetheless meet the standard for deference set forth in *Lodestar Energy*. The inquiry is whether the Secretary's interpretation is consistent with the regulation and not clearly erroneous or impermissible. I find no indication that the Secretary's interpretation is clearly erroneous or impermissible. Further, the Secretary's interpretation is not inconsistent with the language of the

Further, the testimony of Respondent's witness on the previous enforcement of this standard indicates Respondent had fair notice of the requirements under the Secretary's interpretation.

Respondent admits no cathead was attached to the welder in question. Given these facts, I determine this constitutes a violation of 30 C.F.R. § 75.903.

2. Gravity and S&S

An established violation of 30 C.F.R. § 75.903 satisfies the first *Mathies* element. The absence of a cathead contributes to a discrete safety hazard in creating an increased risk of electrocution. (Tr. 132-134.) Electrocution by the 480-volt welder in question is reasonably likely to lead to cardiac arrest, if not death. (Tr. 144:24-145:22.) Thus, the second and fourth *Mathies* elements are satisfied. However, injury as a result of this violation is predicated on electricity being conducted through the welder and its lead wires. When Jackson found the welder, it was not connected to a power source. The end of the power cable was 5 feet away from the power center. (Tr. 137:5-8.) The condition of the welder cables could have resulted from the machine being used without a cathead. (Tr. 130:17-131:12.) However, equally credible testimony was given by Baker that the condition of the leads can be explained by the process of fitting the leads to go into an incorrectly sized cathead. (Tr. 221:23-223:6.) Additionally, the ground wires may have legitimately been split to facilitate the use of a wireless ground monitor system. (Tr. 223:13-22.) Thus, I do not find sufficient evidence to establish that the welder was in use without a cathead. Further, the welder is not an item continuously needed during the production shift, as it is only utilized to make miscellaneous repairs. (Tr. 138:8-13.) It is more frequently utilized during the maintenance shift which followed directly after the shift of the inspection. (Tr. 138:6-10, 152:7-13.) Two hours remained in the production shift at the time of the citation. (Tr. 152:2-13.) Under normal mining conditions, there is no indication that the

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regulation; rather, it advances the regulation's objective. The consequence of the Secretary's interpretation is that catheads would be required on welders at all times. Interestingly, this is already the dominant policy at Liggett Mining. (Tr. 211:6-11.) Additionally, the relevant section of MSHA's *Program Policy Manual* ("PPM") states that, "[d]isconnecting devices shall be plainly marked for identification to reduce the chance of energizing a cable while repairs are being made on the cable." V MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 75, at 85 (2003). Respondent argues the standard was not violated because there was visual evidence the power was disconnected. (Resp't Br. 16.) However, the language of the PPM indicates the purpose of the standard is also to prevent miners from accidentally energizing a cable by clearly marking points of contact where power would be conducted. The unraveled state of the power lead and other leads of the welder cited would not put a miner on specific notice of this. Thus, I reject Respondent's argument that the standard is satisfied by providing any form of visual evidence that the power is disconnected.

welder in question would have been needed for immediate use or that it would have been used in the condition it was found, i.e., without a cathead. Nor was there any evidence this was the only welder available. I determine it is unlikely that this welder would have been used in the course of normal mining operations, and I determine that injury as a result of the violation was unlikely to occur. Therefore, I conclude this violation does not meet the third *Mathies* element, and is not S&S.

3. Negligence

The welder in question was lying in a wet area of the mine with exposed cables, and without a disconnecting device. (Tr. 146:19-22, 130:14-15, 129:4-5.) Use of the welder in this violative condition could have led to fatal injury. (Tr. 144:24-145:22.) Historically, the welder has been used in this dangerous manner. (Tr. 164:6-11.) Employees have some interest in continuing this practice, as it saves time and facilitates use of equipment that is far from the power center. (Tr. 142.) Given these factors, a reasonably prudent operator charged with the safety of his employees should have trained and supervised the miners to tag out a welder if its cathead had been removed. However, the welder was not tagged out. (Tr. 137:2-8.) It remained in a busy area of the mine, available for use. (Tr. 137:8-138:5.) Yet no persuasive testimony was given that the miners were using the welder at the time of the inspection. Accordingly, I find the operator acted with moderate negligence.

4. Civil Penalty

The Secretary originally proposed a civil penalty of $2,282. The parties have stipulated that Liggett Mining's ability to remain in business will not be affected by the proposed penalty. (Ex. J-1.) The operator has been cited twice in the last 24 months for violation of the same standard. (Ex. G-11.) This history was properly considered in the Secretary's original proposal in accordance with 30 C.F.R. § 100.3(c). Although my finding of moderate negligence is consistent with the Secretary's original proposal, I have determined that injury is unlikely to occur, so a reduction in the Secretary's proposed penalty is merited. Furthermore, the operator's subsequent actions demonstrate a good faith effort to comply with the standard. Accordingly, I hereby assess a civil penalty of $700.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that Citation Nos. 8317048 and 8317164 are **AFFIRMED**.

Within 40 days of this decision, the Secretary is **ORDERED** to **MODIFY** Citation No. 8329466 by marking that injury is "unlikely" and striking its designation as S&S.

Also within 40 days of this decision, Liggett Mining is **ORDERED** to pay a civil penalty of $5,592.

Alan G. Paez
Administrative Law Judge

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